No. 00-6479

In the

Supreme Court of the United States

October Term 2000

STANLEY DURDEN,
Petitioner

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

On Petition for a Writ of Certiorari
to the Court of Appeal of California, Second Appellate District,
Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is "grossly disproportionate" and thus cruel and unusual punishment in violation of the Eighth Amendment to sentence a homeless man to 25 years to life in prison for the crime of petty theft when the crime consisted of stealing an umbrella and two bottles of liquor worth under $43 on a cold and rainy night.

2. Whether it is "grossly disproportionate" in violation of the Eighth Amendment to treat misdemeanor conduct as a felony because of prior offenses and then to use that enhanced misdemeanor as a third felony strike that is the basis for imposing a sentence of 25 years to life in prison.

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PETITION FOR A WRIT OF CERTIORARI

Stanley Durden petitions for a writ of certiorari to review the judgment of the Court of Appeal of California, Second Appellate District, Division Five.

OPINIONS BELOW

The decision of the California Court of Appeal in People v. Durden was entered April 17, 2000, and is unpublished. It is included here as Appendix A. The Supreme Court of California denied the petition for review on July 12, 2000. That order is included here as Appendix B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The petitioner, Stanley Durden, was a homeless man convicted for stealing an umbrella and two bottles of liquor from a supermarket on a cold and rainy December night. The aggregate retail value of the merchandise was less than $43. Under California law, this generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998).

California law, however, provides that petty theft with a prior conviction is a felony offense. California Penal Code Ann. §666. Because Durden had at least two prior convictions, his petty theft was prosecuted and convicted as a felony. Durden's prior convictions all were relatively minor and all a decade ago or longer. The prior convictions listed in the information as justifying the application of California's "three strikes" law were for robbery or attempted robbery, the most recent being in 1989. (C.T. 12).

Moreover, under California's "three strikes" law, this felony, though based on misdemeanor conduct, was the basis for imposing a punishment of 25 years to life in prison. California Penal Code Ann. §667(e)(2)(A). Durden is now serving this life sentence in California prison, notwithstanding a recommendation from the probation officer that the sentence be a year imprisonment.

REASONS FOR GRANTING THE PETITION

THE SUPREME COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER IT IS "GROSSLY DISPROPORTIONATE" IN VIOLATION OF THE EIGHTH AMENDMENT FOR A CRIMINAL DEFENDANT TO BE SENTENCED TO 25 YEARS TO LIFE IN PRISON FOR PETTY THEFT, CONDUCT THAT IS GENERALLY REGARDED AS A MISDEMEANOR OFFENSE UNDER STATE LAW

A. Grossly Disproportionate Punishments Violate the Cruel and Unusual Punishment Clause of the Eighth Amendment

In Weems v. United States, 217 U.S. 349, 371 (1910), this Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences. On many other occasions, this Court has declared sentences unconstitutional as being "grossly disproportionate." For example, in Coker v. Georgia, 433 U.S. 584, 592 (1977), the Court held that "a sentence of death is grossly disproportionate and excessive for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." In Solem v. Helm, 463 U.S. 277 (1983), the Court held that it was grossly disproportionate to sentence a person to life imprisonment for passing a bad check for $100 because of six prior non-violent offenses. Justice Powell, writing for the Court, observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments." Id. at 288 (citations omitted).

In Harmelin v. Michigan, 501 U.S. 957 (1991), seven Justices

expressly recognized that grossly disproportionate sentences are unconstitutional. In Harmelin, Justice Scalia argued that the Eighth Amendment does not prohibit disproportionate sentences. Id. at 985. However, only Chief Justice Rehnquist joined this part of Justice Scalia's opinion.

Justice Kennedy, concurring in part and concurring in the judgment, expressly disagreed with Justice Scalia, and declared: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly' disproportionate to the crime." Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in Harmelin, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and contended that "gross disproportionality" was too restrictive a constitutional standard. Id. at 1009, 1012 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

No decision since Harmelin has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In fact, in United States v. Bajakajian, 524 U.S. 321, 336 (1998), the Court, in invalidating a forfeiture as violating the Eighth Amendment, stated: "[W]e therefore adopt the standard of gross

disproportionality articulated in our Cruel and Unusual Punishments Clauses precedents."

B. The Court Should Grant Review to Decide Whether the Imposition of a Punishment of 25 Years to Life in Prison is "Grossly Disproportionate" When, as Here, it is Imposed for Conduct that Generally Would be Regarded as a Misdemeanor

This Court has stated that proportionality is to be determined by "objective factors to the maximum extent possible." Rummel v. Estelle, 445 U.S. 263, 274-275 (1980). In Solem v. Helm, 463 U.S. 277 (1983), the Court stated such objective criteria: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Under these criteria, Durden's sentence was grossly disproportionate to the offense. The offense was minor, petty theft, but the punishment was enormous: a sentence of 25 years to life in prison. Under California law, this is deemed to be a life sentence. In re Lynch, 8 Cal.3d 410, 415-416 (1972). The probation officer, a government official charged with recommending the appropriate punishment, thought that the appropriate punishment for Durden would be a sentence of a year in prison. Also, and quite importantly, as Justice Stevens

recently noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

Simply put, the sentence imposed on Durden was both cruel and unusual. A punishment of 25 years to life in prison is cruel when inflicted for committing a misdemeanor. The Court has explained that "courts are competent to judge the gravity of an offense, at least on a relative scale." Solem v. Helm, 463 U.S. at 292. Thus, the Court noted that "[t]he absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars -- a point recognized in statutes distinguishing petty theft from grand theft." Id. at 293. In Solem, the Court concluded that it was cruel and unusual punishment to impose a life sentence for uttering a "no account" check of $100. Durden was sentenced to life imprisonment for stealing $43 of merchandise.

The punishment is unusual because California is the only state in which misdemeanor conduct can be the basis for a sentence of 25 years to life in prison. This Court has noted that "courts properly may look to other jurisdictions in deciding where lines between sentences should be drawn." Id. at 295.

The California Court of Appeal affirmed Durden's sentence and declared: "In short, defendant has not been sentenced to life in prison merely because he was convicted of petty theft with a prior conviction. Rather, he was so sentenced because he

is a serious career criminal who has demonstrated repeatedly that he has no intention of abiding by the laws of the state." People v. Durden, (Cal.Ct.App. 2000) (unpublished disposition), at 8. The court relied expressly on similar language in this Court's decision in Rummel v. Estelle, 445 U.S. at 278.

Although generally the government may punish recidivist conduct harshly, there are several reasons why this argument is flawed as applied here, why Rummel is distinguishable, and why this Court should grant review to determine the meaning of the Eighth Amendment in this context. First, California essentially "double counts" the prior offenses. Because of his prior offenses, Durden's misdemeanor conduct, petty theft, is converted by statute into a felony, "petty theft with a prior conviction." California Penal Code Ann. §666. Then that felony is used to impose a sentence of 25 years to life in prison. In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

States can punish recidivists more harshly, but there is a limit. In Rummel v. Estelle, the Court expressed the need for great deference to legislative choices regarding punishments for recidivists, but stated: "This is not to say that a proportionality principle would not come into play in [an] extreme example . . ., if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11. Yet, that is exactly what California does through its double

counting; a misdemeanor is deemed a felony because of the prior offenses and then as enhanced, the relatively trivial conduct, a homeless man stealing $43 worth of merchandise to keep warm on a cold and rainy night, becomes the basis for a sentence of 25 years to life imprisonment.

Second, this Court never has approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. This Court recently recognized the fundamental historical difference between felony and misdemeanor conduct. In Apprendi v. New Jersey, 120 S.Ct. 2348, 2357 n.7 (2000), the Court observed that "[t]he common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences. The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'" Id. at 2357 n.7 (citations omitted). See also Lewis v. United States, 518 U.S. 322, 328 (1996) (drawing distinction between petty offenses and felonies for purpose of trial by jury under the Sixth Amendment); Felix Frankfurter & Thomas G. Corcoran, Petty Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926) (describing the historic distinction between felonies and petty offenses).

In Rummel v. Estelle, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct.

See 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." Id. at 284. Rummel involved felony theft, while this case concerns what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." Riggs v. California, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by imposing a life sentence is closely analogous to the punishment declared unconstitutional in Solem: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." Id. at 1114 (citations omitted).

In Harmelin v. Michigan, Justice Scalia, joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case:

a homeless man was sentenced to 25 years to life imprisonment for petty theft, stealing an umbrella and two bottles of liquor on a cold and rainy December night.

Third, unlike Rummel, in California, there is tremendous variation in the use of the "three strikes" law based on the county in which a person commits the crime. For example, because of different attitudes of local district attorneys, the three strikes law is applied in Los Angeles and Sacramento counties seven times more often than in Alameda and San Francisco counties. See Mike Males, "Striking Out: The Failure of California's 'Three Strikes and You're Out' Law," 11 Stan. L. & Pol'y Rev. 65, 68 (1999). See also Samara Marion, "Justice By Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July-December 1996," 11 Stan. L. & Pol'y Rev. 29 (1999). This tremendous geographic variance makes this situation much different from Rummel.

This Court should grant review to determine the issue recognized by Justice Stevens in Riggs: does California's unique sentencing scheme violate the Eighth Amendment by converting a misdemeanor to a felony and then using that felony as the basis for imposing a sentence of 25 years to life imprisonment? Is imposing this punishment for stealing $43 worth of merchandise "grossly excessive" in violation of the cruel and unusual punishment clause of the Eighth Amendment?

C. The Court Should Grant Review to Decide this Important Question that Affects Hundreds of Prisoners in California and Will Not Be Resolved in Any Other Manner

These issues were presented for this Court to consider in a petition for certiorari in Riggs v. California, 525 U.S. 1114 (1999). Riggs involved a homeless man who was sentenced to 25 years to life imprisonment for stealing a bottle of vitamins from a supermarket. The Court denied certiorari, with only Justice Breyer dissenting. However, Justice Stevens wrote an opinion respecting the denial of the petition for a writ of certiorari, which was joined by Justices Souter and Ginsburg. Justice Stevens began by noting that "[t]he pro se petition for certiorari raises a serious question concerning the application of California's 'three strikes' law to petty offenses." Id.

Justice Stevens stated that he agreed to the denial of certiorari because "[i]t is prudent for this Court to await review by other courts before addressing the issue." Id. Now, almost two years later, it is clear that such review will not be forthcoming. The California Supreme court repeatedly has denied review of this issue, as it did in this case.

Moreover, habeas corpus review is not possible. Durden urges this Court to find that imposing a sentence of 25 years to life imprisonment for misdemeanor conduct is "grossly disproportionate" and cruel and unusual punishment. Arguably, this would be a "new rule" of constitutional law and not able to

be raised in a habeas corpus petition. See Teague v. Lane, 489 U.S. 288 (1989).

Also, the United States Court of Appeals for the Ninth Circuit has ruled that "as long as the sentence imposed on the defendant does not exceed statutory limits, we will not overturn it on Eighth Amendment grounds." Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998). This forecloses use of habeas corpus to challenge the constitutionality of California's imposition of life sentences for misdemeanor conduct because they are within the statutory limits. Indeed, federal district courts in California have dismissed habeas corpus petitions challenging California's "three strikes" law as constituting cruel and unusual punishment. See, e.g., Gamble v. Pliler, 2000 WL 126125 (N.D. Cal. 2000); White v. Galaza, 2000 WL 630861 (N.D. Cal. 2000); Lopez v. Ryan, 2000 WL 709491 (N.D. Cal. 2000); Wallace v. Castro, 2000 WL 1262662 (N.D. Cal. 2000).

According to the most recent statistics published by the California Department of Corrections, 319 people are serving sentences of 25 years to life for having committed the crime of petty theft with a prior conviction. "Third Strike Cases by Offense Group," Department of Corrections, State of California, August 14, 2000. Thus, it is imperative for this Court to decide whether it is cruel and unusual punishment to impose a life sentence for misdemeanor conduct.

D. The Court Should Grant Review to Resolve a Split Among the State Courts as to Whether it is Unconstitutional to Impose a Life Sentence for Misdemeanor Conduct

There is currently a disagreement among the state courts as to whether it violates the Eighth Amendment to impose a life sentence in these circumstances. For example, in People v. Gaskins, 923 F.2d 292 (Colo. App. 1996), the Colorado court found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if there have been prior felony convictions. The California Court of Appeal, in this case, interpreted the Eighth Amendment differently and upheld the life sentence. This Court should grant review to resolve the conflict among the state courts on this important issue of United States constitutional law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

STANLEY DURDEN,

Defendant and Appellant.

B132255

(Los Angeles County
Super. Ct. No. KA043377)

COURT OF APPEAL - SECOND DIST.
FILED
APR 17 2000
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifton L. Allen, Judge. Affirmed.

Stuart Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Linda C. Johnson and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Stanley Durden appeals from a judgment following a jury trial in which he was convicted of petty theft with a prior theft conviction (Pen. Code, § 666) and four prior serious felony conviction allegations were found to be true (Pen. Code, § 1170.12). He was sentenced to state prison for 25 years to life. Defendant contends: the trial court erred by failing to inquire concerning his *Marsden*[1] and new trial motion; the trial court abused its discretion by failing to strike three of his four prior serious felony convictions; and his sentence constitutes cruel and unusual punishment. We affirm.

FACTS

At approximately 8:20 p.m. on January 25, 1999, defendant entered a Lucky's supermarket in Diamond Bar. He stole two bottles of liquor and an umbrella worth a total of less than $50 and left the market. Outside the market, a store theft prevention officer approached him. Defendant shoved the officer. A second store theft prevention officer intervened. Defendant struggled by kicking and flailing his arms. He was eventually subdued and arrested.

DISCUSSION

Marsden and New Trial Motion

At defendant's request, the trial was not bifurcated. On the day of trial, defense counsel requested that the trial court review the strike priors to determine their constitutionality prior to the determination of guilt. Defense counsel indicated he was making the motion at defendant's request and insistence. Defense counsel further

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1 *People v. Marsden* (1970) 2 Cal.3d 118, 123.

indicated that it was defendant's belief he had not knowingly and intelligently waived his constitutional rights with respect to the pleas entered as to the priors and he had not been advised of the possibility of a 25-year-to-life sentence. No written motion had been filed. The trial court stated that a written motion must be filed and the motion would be decided after the determination of guilt.

The jury convicted defendant of petty theft with a prior theft conviction and found four prior serious felony conviction allegations to be true. Defense counsel filed a written motion requesting the trial court exercise its discretion to strike three of the four prior serious felony convictions. At the conclusion of the argument on sentencing, defense counsel told the trial court he would like to present argument on two other issues. Defense counsel stated: "Finally, Your Honor, my client has asked me to make a motion on his behalf. I do not join in this matter. [¶] If I can read this briefly. The motion reads -- and I'll file this with the court's clerk --. [¶] 'That on or about April 28th, 1999, I, Stanley Durden, was in this court and misrepresented by the public defender, Mr. Whitenhill. The Public Defender Whitenhill did not file any motion to fight my priors . . . and/or strikes. [¶] And further, the D.A. [has] and is using invalid prior convictions. Even further, I was not advised of a right of a jury trial against self-incrimination and the right to confront the witnesses against me. All is being held in violation of the 14th Amendment equal protection of the Constitution. [¶] One, I didn't have a 402 hearing or evidence; two, I don't read or write too well. Three, I didn't know what a 969 motion package is; and [four], before I'm sentenced today, I ask the court to hear my plea for a new trial.' [¶] As to the new trial issue, Your Honor, I would join on that issue. [¶] Thank you, Your Honor. Nothing further on this point."[2]

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[2] Defendant's handwritten motion was filed with the clerk after the sentencing hearing and was entitled: "A Motion of a Urgent Need of a Court Appointed Attorney Misrepresentation of Counsel Comes Now before this Honorable Court house Judge."

The trial court refused the request to strike any of the prior serious felony convictions and sentenced defendant to state prison for 25 years to life. The motion for new trial was denied.

Defendant contends the trial court failed to make the proper inquiry into his *Marsden* motion. He argues the trial court was required to inquire concerning his dissatisfaction with defense counsel in order to determine whether a new attorney should be appointed to represent defendant on a motion for new trial. We conclude defendant's written motion orally set forth by defense counsel adequately apprised the trial court of the reasons for defendant's dissatisfaction and no further inquiry was necessary.

"'"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. . . ."' [Citation.]" (*People v. Leonard* (Feb. 28, 2000, C027404) __ Cal.App.4th __ [2000 Daily Journal D.A.R. 2179, 2181].) "*Marsden* explains that 'the trial judge cannot thoughtfully exercise its discretion in this matter without listening to [defendant's] reasons for requesting a change of attorneys.'" (*Ibid.*) "'Failure to inquire adequately into a defendant's complaints results "in a silent record making intelligent appellate review of defendant's charges impossible." [Citation.]'" (*Ibid.*) "[U]nder circumstances in which a defendant has set forth in a 'self-contained document' in sufficient detail the basis for his dissatisfaction with appointed counsel, . . . a 'full-blown hearing' on the alleged inadequate representation is not required." (*People v. Horton* (1995) 11 Cal.4th 1068, 1103; *People v. Freeman* (1994) 8 Cal.4th 450, 481; *People v. Wharton* (1991) 53 Cal.3d 522, 580.)

In this case, it may not have been apparent to the trial court that defendant was making a *Marsden* motion as opposed to a new trial motion. A defendant is required to give some "'clear indication'" that he or she wants a substitute attorney. (*People v. Freeman, supra,* 8 Cal.4th at pp. 480-481.) The title of the motion was not read to the trial court and the body of the motion simply refers to "misrepresentation" and does not

request the appointment of new counsel. The body of the motion asks for a new trial on the grounds: (1) defense counsel failed to make a motion contesting the constitutionality of the pleas in the prior convictions; (2) the prior convictions were constitutionally invalid; (3) he should have received an Evidence Code section 402 hearing; and (4) he had been unaware of the nature of a Penal Code section 969b priors package. Defendant did not orally request appointment of a new attorney and said nothing at the sentencing hearing indicating he was dissatisfied with defense counsel.

Moreover, it is apparent that defendant's dissatisfaction with defense counsel related solely to the prior convictions. It is also apparent from the record that defendant believed his priors were unconstitutional, while defense counsel did not. From the outset, defense counsel made it clear that the motion concerning the constitutionality of the priors was being made at his client's insistence. One of the bases of any such motion was clearly untenable in that there is no requirement a defendant entering a plea of guilty or no contest be advised of future consequences of the plea relating to recidivism. As to any other grounds, defense counsel apparently deliberately provided no reporter's transcripts and did not make a written motion when given the opportunity to do so. These failures do not appear to have been unintentional. The issue was squarely presented on the record. The trial court could certainly have recognized defense counsel's reluctance to raise the issue.

We are unpersuaded by defendant's arguments on appeal that the dissatisfaction with counsel arose from issues arising at the guilt portion of the trial, such as the failure to make a motion to suppress defendant's statement to the police, the failure to adequately cross-examine the store loss prevention officer, and the failure to object to prosecutorial misconduct. Defendant's dissatisfaction from the outset was as to the prior convictions. Defense counsel had made every effort with the prosecution and the trial court to have this case treated as a second rather than a third strike. He was unsuccessful. Defense counsel, however, did not challenge the constitutionality of the priors, although

he was well aware of the issue and its importance. Nothing in the record suggests that defense counsel's evaluation was incorrect.

We conclude, to the extent defendant requested the appointment of new counsel, he adequately explained the reasons for his dissatisfaction in the written motion, and the trial court did not abuse its discretion under these circumstances by failing to inquire further or appoint a new attorney.

Abuse of Discretion

Defendant contends the trial court abused its discretion when it refused to strike three of his four prior serious felony convictions to enable him to obtain a second strike sentence rather than a third strike sentence. We disagree.

Defendant has a lengthy criminal record spanning 20 years and including four serious felony convictions. Defendant's criminal record is as follows: 1978 attempted robbery, two years state prison; 1980 attempted robbery, probation, probation revoked, two years state prison; 1982 second degree burglary, two years state prison; 1985 robbery, three years state prison; 1987 grand theft person, sixteen months state prison; 1989 robbery, ten years state prison, parole revoked; and 1997 under the influence of a controlled substance, probation and jail. Moreover, the instant offense involved the theft of alcohol and violent behavior on the part of defendant when he was apprehended by store loss prevention officers.

We find no abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 162; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) Defendant's longstanding disability did not require the trial court to strike three prior serious felony convictions, which had also been committed while defendant suffered from the same disability. We note that the record does not support defendant's assertion that the trial court did not review the probation report.

Cruel and Unusual Punishment

Defendant contends his sentence constitutes cruel and unusual punishment under the California and United States Constitutions. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.)

A defendant must overcome a considerable burden in a challenge under the cruel and unusual punishment provision of the California Constitution. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) "A punishment may violate the California Constitution although not 'cruel or unusual' in its method, if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The *Lynch* court identified three techniques courts used to administer this rule. First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions." (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)

However, a determination can properly be made based on the first *Lynch* factor alone.[3] (*People v. Weddle, supra,* 1 Cal.App.4th at p. 1197.) The focus on the offense

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[3] Defendant's claim under the federal Constitution can also be analyzed under a single factor. In *Solem v. Helm* (1983) 463 U.S. 277, a majority of the Supreme Court concluded a similar three-part test should govern analysis of federal cruel and unusual punishment claims. It focused on "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Id.* at p. 292.) However, this test did not retain the support of a majority of the court in *Harmelin v. Michigan* (1991) 501 U.S. 957. Justice Scalia, joined by Chief Justice Rehnquist, concluded *Solem* was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (*Id.* at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences which are "grossly disproportionate" to the crime. (*Id.* at p. 1001.) These three justices concluded that consideration of the second and third *Solem* factors is necessary only when the first factor suggests the sentence may be grossly disproportionate. When

considers the crime both in the abstract and in view of the totality of the circumstances surrounding its commission, including such factors as motive, the manner in which the crime was committed, the extent of defendant's involvement, and the consequences of the acts. (*Ibid.*) The focus on the offender considers factors such as defendant's age, prior criminality, personal characteristics, and state of mind. (*Id.* at p. 1198.)

In this case, defendant has failed to show that his sentence is grossly disproportionate to the crime committed. The trial judge in this case carried out the express intent of the Legislature, punishing defendant not merely for his current felonies but also for his recidivism. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-825.) As previously indicated, defendant's criminal record was lengthy and serious. "One in [defendant's] position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. [A recidivism statute] thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." (*Rummel v. Estelle* (1980) 445 U.S. 263, 278.)

In short, defendant has not been sentenced to life in prison merely because he was convicted of petty theft with a prior theft conviction. Rather, he was so sentenced because he is a serious career criminal who has demonstrated repeatedly that he has no intention of abiding by the laws of this State. Defendant's sentence is not so disproportionate to his crime that it shocks the conscience and offends fundamental notions of human dignity. Accordingly, this sentence does not violate the prohibition against cruel and unusual punishment.

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the first factor shows the sentence is constitutional, the analysis is complete. (*Id.* at p. 1005.) Since three justices would uphold a sentence satisfying the first factor, and two justices would uphold a sentence against any proportionality challenge, it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P.J.

GODOY PEREZ, J.

APPENDIX B

Court of Appeal, Second Appellate District, Division Five - No. B132255
S088728

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

THE PEOPLE, Respondent,

v.

STANLEY DURDEN, Appellant.

SUPREME COURT
FILED
JUL 12 2000
Frederick K. Ohlrich Clerk
DEPUTY

Petition for review DENIED.

GEORGE

Chief Justice